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NTSB Order No. EA-5275

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of March, 2007

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket No. SE-17468
v.)	
)	
GREGORY ALAN SIMMONS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued February 1, 2006, following a hearing limited to the issue of sanction.¹ By that decision, the law judge affirmed the 240-day suspension of respondent's private pilot certificate for respondent's

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

violation of sections 91.13(a), 91.111(a), and 91.155(a) of the Federal Aviation Regulations (FAR).² Respondent has appealed the law judge's order with regard to sanction. We deny respondent's appeal.

² FAR sections 91.13(a), 91.111(a), and 91.155(a) provide, in pertinent part, as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

§ 91.111 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

* * * * *

§ 91.155 Basic VFR weather minimums.

(a) Except as provided in paragraph (b) of this section and § 91.157, no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from the clouds that is less, than that prescribed for the corresponding altitude and class of airspace in the following table:

* * * * *

Airspace	Flight visibility	Distance from clouds
Class E: Less than 10,000 feet MSL.	3 statute miles	500 feet below. 1,000 feet above. 2,000 feet horizontal.
At or above 10,000 feet MSL.	5 statute miles	1,000 feet below. 1,000 feet above. 1 statute mile horizontal.

The Administrator's order alleged the following facts and circumstances:

1. You are now, and at all times mentioned herein were, the holder of Private Pilot Certificate No. 483942326.
2. On or about December 31, 2002, you acted as pilot in command of a Beech Baron aircraft, N82LB, that departed from the Telluride Regional Airport, Colorado under visual flight rules (VFR).
3. After your departure you headed towards the Cones VOR and, while in Class E airspace, you failed to maintain the required VFR cloud clearance.
4. You entered instrument meteorological conditions without activating your IFR flight plan and obtaining the appropriate ATC clearance.
5. You passed within 400 - 700 feet of a passenger carrying commercial aircraft creating a collision hazard.
6. Your operation of N82LB as described above was careless or reckless, endangering the lives and property of others.

Based on these alleged violations, the Administrator ordered respondent's private pilot certificate suspended for 240 days. After the Administrator issued this order, respondent failed to file a timely answer. The Administrator subsequently filed a

motion for summary judgment, and Chief Administrative Law Judge William E. Fowler, Jr. partially granted the motion and deemed the factual allegations of the complaint to be admitted. The chief law judge's order also partially denied the motion with regard to the issue of sanction, and ordered a hearing, at which parties could, "present evidence both in support and in mitigation of [the 240-day] sanction." Order Granting in Part Administrator's Mot. for J. on the Pleadings and Limiting Hr'g to the Issue of Sanction (Oct. 21, 2005) at 7. Subsequently, the Safety Board's Office of Administrative Law Judges assigned this case to Administrative Law Judge Patrick G. Geraghty to resolve the issue of appropriate sanction.³ Judge Geraghty conducted a hearing on February 1, 2006, and upheld the imposition of the 240-day suspension.

At the hearing, the Administrator called Captain Matthew Ian Rapp, who acted as captain of the Great Lakes Airlines flight on December 31, 2002, that respondent closely passed. Captain Rapp verified that respondent closely passed over the Great Lakes flight on Captain Rapp's approach into Telluride. Captain Rapp also testified that he notified Great Lakes Airlines, which in turn informed the appropriate Flight

³ Respondent's appeal brief does not contest the chief law judge's order granting partial summary judgment and limiting the proceedings to the issue of sanction.

Standards District Office of the close proximity within which respondent's aircraft passed him. Transcript (Tr.) 19; Exhibit (Exh.) R-6. The Administrator also called FAA Inspector Carl Miller, who testified that respondent had filed an IFR flight plan, but, when attempting to activate the plan, learned that, "there would be a significant delay and he was like number four for departure." Tr. 31. Respondent never activated the IFR flight plan. Id. Inspector Miller also testified that he referred to the Administrator's Sanction Guidance Table, and stated that he relied on the Table when proposing the 240-day suspension, as well as FAA Advisory Circular 00-46D, which sets forth the requirements for the Aviation Safety Reporting Program (ASRP), because respondent had timely filed a report under the ASRP. See Tr. 32, 44. Inspector Miller stated that, after concluding his investigation into the events described herein, he determined that respondent did not qualify for a sanction waiver under the ASRP. Tr. 45. Inspector Miller stated that he reached this conclusion because he "felt that this violation ... was deliberate and it was intentional." Id. Finally, on rebuttal, the Administrator called Mr. Mike Aronovich, who, as a pilot for Great Lakes Airlines on December 31, 2002, observed respondent's flight from the ground. Mr. Aronovich testified

that the weather conditions in and around Telluride "[were] not suitable for VFR flight" in his judgment. Tr. 80.⁴

Respondent testified that he departed under VFR, and never intended to fly in IFR conditions.⁵ Respondent stated that he was surprised by his entry into IMC conditions.⁶ Tr. 56. Respondent also stated that he had instrument charts in his aircraft, but that they were on the floor of the aircraft and he did not use them for the flight. Tr. 59. Respondent then called Mr. Adam Peck, who was the sole passenger who accompanied respondent during the flight that is the subject of this appeal. Mr. Peck testified that, within 2 to 3 minutes after taking off, respondent was "in the clouds." Tr. 67. Finally, respondent called Mr. Paul Mackey⁷ to provide expert testimony, as an

⁴ Mr. Aronovich also described the conditions in and around Telluride as "dynamic," and stated that, "the weather was very, very marginal out to the west, because it is a boxed canyon," and that, "just a mile or two miles away to the west the clouds could be obscuring the area completely." Tr. 82. Mr. Aronovich concluded that, in his opinion, "[t]he weather was very marginal." Id.

⁵ We note that this claim is at odds with respondent's decision to file an IFR flight plan.

⁶ We note that the record indicates that the flight at issue occurred in daylight conditions. See Exh. R-10 (NASA Aviation Safety Reporting System Identification Strip, listing the time of occurrence as 10:30 am).

⁷ The transcript from the hearing references Mr. Mackey as a Colonel. According to the transcript, Mr. Mackey currently serves as director of services of joint force headquarters for the National Guard in the State of Oklahoma, an airline pilot

independent aviation consultant, with regard to whether respondent's report pursuant to the ASRP should qualify as an affirmative defense, and other potentially mitigating factors. Mr. Mackey opined that the respondent's reporting of the incident to the National Aeronautics and Space Administration (NASA) met the requirements of the ASRP, and that such reporting should obviate the imposition of any sanction against respondent. Tr. 74. Mr. Mackey also stated that he had reviewed the evidence in the record for this case, and that he believed that respondent's actions were, "unintentional and inadvertent." Id.

The law judge, in evaluating whether respondent's report to NASA of the incident obviated the need for a sanction under the ASRP, concluded that respondent's actions were reckless; therefore, the law judge held that a 240-day suspension of respondent's private pilot certificate was appropriate. In his decision, the law judge summarized the evidence in the record, stating that respondent's close encounter with Captain Rapp's

(continued)

who holds the title of "captain" with American Airlines, and an expert witness for civil litigation. The law judge designated Mr. Mackey as an expert based on his certification from a United States Air Force aircraft mishap investigation course, volunteer work, and experience with the Allied Pilot's Association. In this opinion, we will not refer to Mr. Mackey as "colonel," given that his designation as an expert also arises out of experience in civilian contexts.

aircraft was foreseeable and not inadvertent, because the VMC conditions were marginal and IMC conditions were present to the west. The law judge stated, "[p]roceeding directly out on the reciprocal of the inbound localizer in IMC conditions not knowing whether or not another aircraft is making the approach is a foreseeable hazard. You're taking the chance that nobody's coming in." Tr. 102.⁸ The law judge concluded, therefore, that respondent operated the aircraft in a reckless manner. Id. The law judge upheld the Administrator's choice of sanction, noting that the Board typically shows deference to the choice of sanction, and that the gravity of respondent's near-miss with another aircraft warranted upholding the Administrator's choice

⁸ In rejecting respondent's claim that he inadvertently entered IMC conditions, the law judge emphasized that respondent's unapproved entry into IMC conditions caused a significant, foreseeable risk under the circumstances:

In my view, it was foreseeable on the conditions as they have been established on what I believe the credible and reliable evidence as to the marginality of the VMC conditions at the airport and the fact that it's not disputed that IMC conditions were to the west ... In my view, therefore, that the departure by the Respondent and climbing out into IMC conditions, not contacting anybody to alert them to the fact, and continuing on the reciprocal when it was reasonable to also assume that other aircraft could be coming in, and whether or not they were he didn't know ... [was] not an inadvertent encounter with IMC.

Tr. 101.

of sanction. The law judge also noted that such a sanction was consistent with the public interest in aviation safety, as it would hopefully act as a deterrent to other operators. Tr. 102-103. Respondent demonstrates no error, nor do we discern one, in the law judge's analysis and conclusion. Accordingly, the record affords no basis to disturb the law judge's decision regarding sanction.

On appeal, respondent presents three issues. Respondent argues that the law judge's failure to allow respondent to cross-examine the Administrator's witnesses and place ATC tape recordings in the record denied respondent due process. Respondent also argues that the law judge's affirmation of the sanction was contrary to the weight of the evidence. Finally, respondent argues that the law judge misinterpreted the applicable Safety Board case law, precedent, and policy with regard to the imposition of sanction after respondent reported the incident in accordance with the ASRP. The Administrator opposes each of respondent's arguments, and urges the Board to affirm the law judge's decision concerning sanction.

The Board allows law judges significant discretion in overseeing administrative hearings. See 49 C.F.R. § 821.35(b); Administrator v. Kachalsky, NTSB Order No. EA-4847 at n.4 (2000); see also Administrator v. Reese, NTSB Order No. EA-4896

at n.4 (2001). A careful review of the transcript of the administrative hearing indicates that the law judge did allow respondent's counsel to cross-examine witnesses, and that he appropriately considered allowing respondent's counsel to place the relevant ATC tape recordings into evidence.⁹ The law judge concluded that respondent's counsel did not articulate how the ATC tape recordings would be relevant to sanction, and we find no error in the law judge's conclusion.¹⁰

Respondent further contends that the law judge erred in not allowing respondent's counsel to cross-examine Inspector Miller with regard to how the inspector conducted his investigation into the allegations, and that the law judge should not have

⁹ The law judge clearly explained that the only issue that he would consider at the hearing was that of sanction. After that explanation, the law judge asked respondent's counsel what effect the ATC tape recording would have on addressing mitigation of the sanction. Tr. 7. Respondent's counsel responded by stating that the ATC tapes would "show that there was a 700-foot clearance between the aircraft." Id. The law judge ruled that such evidence would only be relevant to the facts of the case, and not the sanction for respondent's conduct.

¹⁰ Respondent also argues that if the law judge had allowed the ATC tape recordings into evidence, then respondent's counsel could have cross-examined Captain Rapp using those recordings. This argument is moot, based on our finding that the law judge did not err in not allowing admission of the ATC recordings. Respondent also argues that the law judge erred in not allowing respondent's counsel to cross-examine Captain Rapp sufficiently. We have reviewed the transcript in the context of each of the issues that respondent raises, and agree with each of the law judge's determinations on these issues of cross-examination.

allowed Inspector Miller to mention the ATC recordings. These arguments are irrelevant to the issue of sanction and are meritless. Overall, after a careful review of the transcript of this hearing, we find that the law judge's conclusions with regard to the scope of the testimony and the cross-examination were not erroneous.

In addition, respondent argues that the weight of the evidence does not support some of the factual conclusions on which the law judge based his analysis. However, the chief law judge's previous order that partially granted summary judgment in favor of the Administrator already established the facts of the case.¹¹ Overall, we find that respondent's assortment of arguments regarding the law judge's conclusions concerning the weight of the evidence, and evidentiary rulings at the hearing, are not persuasive.

Finally, respondent argues that the law judge was obligated to waive the sanction for respondent's violations under the ASRP, and that this failure to waive the sanction is contrary to

¹¹ For example, the facts in the record unambiguously established that IMC conditions existed west of Telluride. Tr. 23-25, 48, 52. In addition, the law judge appropriately considered Inspector Miller's testimony with regard to whether Inspector Miller misspoke when describing respondent's conduct. Tr. 48-49.

law, precedent, and policy.¹² The law judge carefully considered the application of the ASRP to the facts of the instant case, and concluded that, although respondent had filed a timely report with NASA, his operation of the aircraft in the IMC environment was not inadvertent. The law judge stated that, when one places oneself at a significantly increased risk of committing a violation, then the violation is foreseeable and therefore not inadvertent. Tr. 99-100. We find that the relevant case law supports this conclusion. We have long held that the ASRP will not obviate the imposition of a sanction when an operator's conduct is deliberate or intentional such that it reflects a "wanton disregard of the safety of others" or a "gross disregard for safety." Administrator v. Fay, 7 NTSB 951, 956 (1991); see also Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982); Administrator v. Understein, 3 NTSB 3552, 3558, order

¹² Under the ASRP, the imposition of a sanction may be waived, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA); the filing of a report with NASA concerning a violation of the Federal Aviation Regulations may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation. Id.

den. recon., 3 NTSB 3564 (1981). We have also stated that, in general, the ASRP was never designed to protect those who exhibit a reckless disregard for safety. Administrator v. Halbert, NTSB Order No. EA-3628 at 3 (1992). The law judge elaborated on the characterization of intentional, reckless, and deliberate behavior, and then applied the Board's precedent regarding such behavior to the facts of this case. Tr. 99-102. In addition, Mr. Mackey's expert testimony was cursory and did not provide persuasive justification for a waiver of sanction under the ASRP. Therefore, we do not agree with respondent's argument that the law judge's conclusions were contrary to law, precedent, or policy.

Respondent's close proximity to Captain Rapp's aircraft at the time of the relevant events presents a significant safety issue. Moreover, respondent entered the IMC area very soon after taking off, and the approach plate shows that respondent proceeded over 2,000 vertical feet while in IMC conditions without the requisite ATC clearance. Even though respondent had filed for an IFR flight plan, he never activated it, and then encountered IMC conditions that were foreseeable. Overall, the facts on this record indicate that respondent's encounter with the IMC area was reckless. We find that waiving the sanction in this case would be inconsistent with our precedent regarding

sanction waivers in response to ASRP reports. Specifically, Understein, 3 NTSB at 3558, contains facts that are closely similar to the factual background of the case at issue here, and in that case, we concluded that the respondent's takeoff into clouds without proper IFR clearance was reckless, and that, as a result, he was not within the grant of immunity that the ASRP provides. Id. at 3555. In Understein, we also cited previous case law for the rule that, when an airman files a report pursuant to the ASRP, "a pilot can only be exonerated from full responsibility for unintentional flight into IFR weather when the IFR weather conditions are unforeseeable and not avoidable by the exercise of sound [judgment] both before and during the flight." Id. at 3558 (citing Administrator v. Hollis, 2 NTSB 43 (1973)).

On the record of the case at hand, the facts indicate that IFR conditions were foreseeable to many witnesses and airmen in the area, and that respondent's entry into IFR weather conditions was avoidable, because respondent could have activated his IFR flight plan or otherwise arranged to avoid the area. Therefore, in spite of respondent's reporting of the incident in accordance with the ASRP, we find that, on this record and based on our precedent, respondent's unapproved entry into IMC and close proximity to another aircraft was

foreseeable, and waiver of sanction under the ASRP would be inappropriate. The Board finds that safety in air commerce or air transportation and the public interest requires the affirmation of the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 240-day suspension of respondent's private pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹³

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

¹³ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).